PP

v.

JAMAL SAHMAD & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH JC
[CRIMINAL APPEAL NO: 41-12-2005 III (I)]
7 APRIL 2006

CRIMINAL LAW: *Penal Code - Section 354 - Using criminal force to outrage modesty - Proof - End of prosecution case - Identification parade - Whether defective and unreliable - Corroboration - Absence of corroborative evidence - Whether fatal - Penal Code, s. 354*

This was an appeal against the decision of the learned magistrate acquitting and discharging the two accused herein on a charge of outraging modesty under s. 354 Penal Code without calling for their defence. The facts showed that two grounds were cited by the learned magistrate for her decision, namely, that the identification parade that was conducted by the police appeared doubtful, inadequate and unreliable, and secondly, that there was no positive identification of the two accused by the victim ('PW2'). More specifically, the learned magistrate noted that PW8, the officer who organized the identification parade, could not confirm that PW2 had identified the accused. It was further her finding that PW2's evidence was not sufficiently corroborated, was shaky and could not therefore implicate the accused. The prosecution appealed and argued that the prosecution evidence as a whole had proved a *prima facie* case against both the accused, and that the learned magistrate had therefore erred in fact and in law *vis-à-vis* her findings aforesaid.

Held (dismissing the appeal):

(1) It is strange that not only that PW8 could not confirm what happened at the identification parade but there was also no report of the identification parade tendered in court. This report was alluded to by PW6, the investigating officer of the case. Without the report, neither this court nor the court below could find any use of the identification of the accused by the victims. (para 11)

(2) The offence herein is a sexual offence and as such the law of prudence is not to convict unless the complainant's evidence are overwhelmingly convincing or there is independent corroboration of the complainant's evidence. (para 16)

(3) PW2's evidence suffered in two aspects. First, she testified that the place of the incident was dark and her eyes were covered. Secondly, the prosecution had called PW3 (charged together with the two accused and had pleaded guilty to the charge) and his evidence was one of direct contradiction to that of PW2. According to PW3, there was only him and PW2 at the place of the incident where he had tried to forcibly have sex with her. There was no reference to the two accused and, to compound the matter, there was no attempt by the prosecution to impeach PW3. (para 16)

(3a) It can safely be inferred that PW3's evidence had at the very least created a reasonable doubt in the prosecution case. And, to further dent the prosecution case, there was no corroboration of PW2's evidence. Clearly, the presence of PW3's evidence demands that the evidence of PW2 must be corroborated before any reliance is placed upon them. Consequently, the learned magistrate was correct in holding that there was no case to answer and in acquitting and discharging the accused at the end of the prosecution case. (paras 18 & 19)

[Decision of learned magistrate upheld.]

Case(s) referred to:
Jaafar Deris v. PP [1956] MLJ 183 ***(refd)***
Lim Guan Eng v. PP [1998] 3 CLJ 769 CA ***(refd)***
Ooi Teik Chinn v. PP [1971] 1 MLJ 51 ***(refd)***
PP v. Mohd Radzi Abu Bakar [2005] 244 MLJU 1 ***(refd)***
Tan Thong Jin v. PP [2003] 3 CLJ 552 CA ***(refd)***

Other source(s) referred to:
Augustine Paul, *Evidence Practice and Procedure*, 3rd edn, pp 1013-1023
Mallal's Criminal Procedure, 4th edn, p 155

For the appellant - Young Leou Shin; DPP
For the 1st respondent - Osman Ibrahim
For the 2nd respondent - Terabawan Mandi

Reported by Rose Aziz

JUDGMENT

David Wong Dak Wah JC:

[1] The respondents were acquitted and discharged at the end of the prosecution case by the learned magistrate on 18 April 2005. The charge preferred against the respondents was as follows:

That you, jointly, with one other still at large, on the 6th day of September 1998, at about 9.00 pm at Lorong 10, Kampong Semariang Batu, Petra Jaya, Kuching, in the state of Sarawak, used criminal force on one Kasmah bt Alan (F) aged 15 years, knowing it to be likely that you would thereby outrage her modesty, and you thereby committed an offence punishable under section 354 of the Penal Code.

[2] The prosecution appealed against the learned magistrate's decision and their grounds of appeal are as follows:

1. The learned magistrate erred in law when she ordered the prosecution to close their case without allowing the prosecution to adduce further evidence.

2. The learned magistrate erred in law and in fact in her finding that the prosecution has failed to prove a *prima facie* case against the respondents where she decided that the only evidence against the accused was that of the complainant herself and she found that was not sufficiently corroborated to implicate any of the accused.

3. The learned magistrate was wrong for not appreciating the positive evidence about the identity of the respondents by the complainant despite the fact there was nothing inherently improbable about the complainant's story, and her evidence remained unshaken by cross examination and supported by identification parade.

4. The learned magistrate had erred in law and in fact when she came to the conclusion that PW8's evidence regarding the conduct of the Identification Parade is vital and thus rendered the identification of the accused doubtful.

5. The learned magistrate's decision in acquitting and discharging the respondents is most unsatisfactory and cannot be supported having regard to the weight of the evidence adduced by the prosecution.

[3] At the outset of the appeal, learned DPP withdrew ground 1.

[4] As for ground 5, learned counsel for the 1st respondent submits that it is bad in law as it does not contain any specifics on the judgment appealed against.

[5] He relies on the case of *Ooi Teik Chinn v. PP* [1971] 1 MLJ 51 where the learned judge said:

> Under s. 259(2) of the Criminal Procedure Code, it is for the appellant to show that the conviction is unreasonable or cannot be supported having regard to the evidence. In *Goh Ah Too v. Regina* [1956] MLJ 139 the court drew attention to the decision of the Privy Council in *Aladesuru v. R* [1956] AC 49 where it was laid down that in order to succeed an appellant must show, in the words of the statute, that the verdict is unreasonable or cannot be supported having regard to the evidence. It was not sufficient ground of appeal to allege that the verdict is against the weight of evidence' and that the phrase was inaccurate and could not properly be substituted for the words of the statute

[6] The rationale of the just cited case is a sound one and as such I hold that ground 5 is bad and hereby strike out the same.

[7] Grounds 2 to 4 basically refer to the learned magistrate's finding of no *prima facie* case being made out. Her reasons, namely the identity of the respondents by the victim being suspect, the inadequacy of the identification parade, and her finding of PW8's evidence, in the opinion of the learned DPP were not supported by the evidences.

[8] At this juncture I should state the law of what does '*prima facie* case' mean. The latest judicial pronouncement can be found in the case of *PP v. Mohd. Radzi bin Abu Bakar* [2005] 244 MLJU 1 where the Federal Court through Gopal Sri Ram said:

> For the guidance of the courts below, we summarize as follows the steps that should be taken by a trial court at the close of the prosecution's case:
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> (i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favorable to the accused;
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> (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am 1 prepared to convict him on the evidence now before me? If the answer to that question is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "NO" then, a *prima facie* case has not been made out and the accused should be acquitted;
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> (iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. Public Prosecutor* [1963] MLJ 263.

[9] In this appeal I also remind myself what was stated by Mohd Noor Ahmad in the case of *Tan Thong Jin v. PP* [2003] 3 CLJ 552 CA:

> It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. But it is the duty of the appellate court to intervene in a case where the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion (see *Sivalingam v. Periasamy* [1996] 4 CLJ 545.) We make it clear here that the function of making primary findings of fact is confirmed exclusively to the trial court. We do not make findings of fact. We merely review the findings of primary fact made by the trial court. In the exercise we are alert to what was said by Mohamed Dzaiddin FCJ (as he then was) in China *Airlines Ltd. v. Maltran Air Corp Sdn. Bhd. (formerly known as Maltran Air Services Corp Sdn. Bhd) and Another Appeal* [1996] 3 CLJ 163 to the effect that:
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> (1) It is a settled principle of law that in an appeal where facts have to be reviewed, it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy (see p. 527E); *Crofter Hand Woven Harris Tweed Co Ltd & Ors v. Veitch & Anor* [1942] 1 All ER 142 and *Watt (or Thomas) v. Thomas* [1947] 1 All ER 582 followed.
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> (2) However, a distinction can be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former (see pp. 5271 and 528A-B); *Benmax v. Austin Motor Co Ltd* [1955] 1 All ER 326 and *Toy Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] MLJ 87 followed.
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> (3) As the trial judge did not make any specific finding of fact based on the evidence of witness and the documents and there was nothing in her judgment which indicated her decision was based on the credibility of the witnesses or as a result of the impression she formed of them, the appellate court is in as good a position to review and evaluate the evidence of the case as the trial judge.

[10] This appeal revolves solely on the identification of the respondents at the scene of the offence and the identification parade. The ingredient of molestation of the complainant (PW2) is not a matter of dispute.

[11] I shall first deal with the identification parade. It can be said that identification parade is only conducted when the alleged assailants are not known to the victim previously. The learned magistrate in her judgment found that the identification parade doubtful hence placed no reliance on it. Her main reason was that PW8 the officer who organized the identification parade could not confirm that PW2 had identified the respondents. Not only do I find strange that PW8 could not confirm what happened at the identification parade, there was no report of the identification parade tendered in court. This report was alluded to by PW6, the investigation officer of the case. Without that report, neither this court nor the court below can find any use of the identification of the respondents by the victim. I say that because there is no evidence to show how the identification parade was conducted. The law on the procedure of how an identification parade should be conducted is summarized in *Mallal's Criminal Procedure*, 4th edn at p. 155 which, among others, provide the following guidelines:

1. An accused should be placed among a specific numbers of people. The ratio should be no less than ten people to one accused.

2. The people used for the identification parade should be from the same races.

3. When there are two or more accuseds, there should be separate identification parade for each accused.

[12] As stated earlier there is no evidence in court that the above procedures were adhered to. That being the case I agree with the learned magistrate's conclusion on identification parade.

[13] As for the identification by PW2 of the respondents at the scene of the offense, the learned DPP submitted that PW2 had in fact made a positive identification of the respondents. Learned counsels for the respondents submitted that as the evidence of PW2 is suspect, corroboration is required and since there was no corroboration of the evidences of PW2, the learned magistrate was correct in her decision.

[14] The learned magistrate's reasons for ruling that there is no *prima facie* case in her words are as follows:

> The incident happened when it was already dark and as the complainant said; her view was impeded by the hands of her assailants. The accused were known to the complainant that very day it happened, too brief a time for the complainant to be familiar with the appearance of the accused for a positive identification.

PW3, in his evidence did not implicate any of his co-accused in any way for any inference to be drawn.

The only evidence against the accused was that of the complainant herself and it is my finding that it was not sufficiently corroborated to implicate any of the accused. That said and applying the maximum evaluation test, I hold that the prosecution had failed to prove a prima facie case against the accused and I hereby make an order for the 1st accused and 2nd accused to be discharged and acquitted without their defense being called.

[15] The issue which confronts me is whether or not the learned magistrate was correct based on the evidence.

[16] In determining this issue, I look firstly at the nature of this offence. It is a sexual offence and as such the law of prudence is not to convict unless the complainant's evidences are overwhelmingly convincing or there is independent corroboration of the complainant's evidence (see Augustine Paul *Evidence Practice and Procedure*, 3rd edn, pp 1013-1023). In the present case, the evidence of PW2 suffer in two aspects. First she had testified that the place of the incident was dark and her eyes were covered. This testimony must be viewed together with her testimony that she can identify the respondents. Secondly the prosecution had called PW3 who presumably was put to the court as a witness of truth. He was charged together with the 1st and 2nd accused and had pleaded guilty to the charge. His evidence was one of direct contradiction to that of PW2. He testified that there was only him and PW2 at the place of the incident where he had tried to forcibly have sex with her. There was no reference to the 1st and 2nd accused. Understandably there was no cross examination by the defense. To compound the matter, there was no attempt by the prosecution to impeach PW3 and as such the evidence of PW3 remain part of the prosecution's case. The learned DPP urged this court to ignore PW3's evidence on the ground that he is an accomplice. She was of course referring to the trite law that accomplice evidence should be treated with utmost care and it would be dangerous to convict if those evidences are uncorroborated. With respect, that principle only applies if the court is requested to rely on the accomplice's evidence to convict. Here it is the reverse. The defense is now using PW3's evidence to the detriment of the prosecution which they are entitled to do so. It is undisputed that PW3 had been convicted and sentenced. The observation of Rigby in *Jaafar Deris v. PP* [1956] MLJ 183 on evidences of such witness is pertinent:

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> Quite clearly, it was the duty of the prosecution, when calling this witness before the Court, to elicit from this witness at once that he had been an accomplice in disposing of the property, and that he had been convicted and sentenced as such. If this had been done, then the Court, although considering him as an accomplice, would have been in a position to decide as to the credibility of his evidence, bearing in mind the fact that he had already been convicted and sentenced and, therefore, had nothing to gain by giving false testimony on behalf of the prosecution.

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[17] I also refer to the case of *Lim Guan Eng v. Public PP* [1998] 3 CLJ 769 CA where Gopal Sri Ram said:

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> Now, among the general rules that govern judicial appreciation of evidence in both civil and criminal causes in the adversarial system of justice there is one of fundamental importance. It is that a party is bound by the evidence of witnesses whom he calls in proof of his case. The rule is enforced with full rigour in civil cases. See *M. Ratnavale v. S. Lourdenadin* [1988] 2 MLJ 371.

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[18] So in the instant case, one can safely infer that PW3's evidence was from someone who had nothing to gain and at the very least had created a reasonable doubt in the prosecution case. And to further dent the prosecution case there was no corroboration of the PW2's evidence, as rightly pointed out by the learned magistrate. The presence of PW3's evidence, in my view, demands that the evidence of PW2 must be corroborated before any reliance is made upon them.

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[19] Based on the forgoing reasons, I find that the learned magistrate was correct when she held that there was no case to answer and ordered a discharge and acquittal. Accordingly I dismiss the appeal.

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